No. 93-714

IN THE
Supreme Court of the United States

October Term, 1994

U.S. BANCORP MORTGAGE COMPANY,
Petitioner,
v.
BONNER MALL PARTNERSHIP,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Should the rule announced in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), extend to cases that become moot in this Court because of the voluntary settlement of the parties?

II. Should the Court exercise its discretion to vacate the decisions below in this case?

LIST OF PARTIES

The petitioner is U.S. Bancorp Mortgage Company. The parent corporation of U.S. Bancorp Mortgage Company is U.S. Bancorp. U.S. Bancorp also is the parent corporation of U.S. Bank of Oregon, U.S. Bank of Washington, and U.S. Bank of California. U.S. Bancorp Mortgage Company has no subsidiaries.

Respondent is Bonner Mall Partnership.

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OPINIONS BELOW

In December 1991, the United States Bankruptcy Court for the District of Idaho granted U.S. Bancorp Mortgage Company ("U.S. Bancorp") relief from the automatic stay to foreclose on the Bonner Mall (the "Mall"), the sole significant asset of Bonner Mall Partnership ("Bonner"). The Bankruptcy Court's Memorandum of Decision is unofficially reported at 1991 Bankr. LEXIS 1402, 1991 WL 330784, and 91 Idaho Bankr. Ct. Rep. 187 and is reprinted at J.A. 29-33. The United States District Court for the District of Idaho

reversed the Bankruptcy Court's decision in July 1992. The District Court's Opinion and Order, and a separate Correction Order, are reprinted at Pet. App. A90-117 and Pet. App. A88-89. The District Court's Order, as corrected, is reported at 142 B.R. 911. That Order was affirmed by the Court of Appeals for the Ninth Circuit pursuant to an Opinion and separate Order filed on August 4, 1993. The Court of Appeals' Opinion is reported at 2 F.3d 899 and reprinted at Pet. App. A1-84.

The opinions below do not address the questions that are now presented to this Court.

JURISDICTION

This proceeding arose under the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (as amended, the "Bankruptcy Code" or "Code"), 11 U.S.C. § 101, *et seq.* (1993). The date of the decision of the Court of Appeals for the Ninth Circuit is August 4, 1993. U.S. Bancorp's Petition for Writ of Certiorari was filed on November 2, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISION INVOLVED

Section 2106 of Title 28 of the United States Code provides:

§ 2106. Determination

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such

further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

This case originally concerned the ability of Bonner's equity holders to retain their ownership of the Mall pursuant to a plan of reorganization rejected by U.S. Bancorp. In the proceedings below, the parties contested whether Bonner's First Amended Plan of Reorganization (the "Original Plan") was unconfirmable as a matter of law because of its reliance on the so-called new value exception.[1]

Around the time that the Court granted U.S. Bancorp's petition for a writ of certiorari in this case, Bonner and its principals indicated that they wanted to settle their disputes with U.S. Bancorp and would agree to the terms of a new loan along lines similar to those proposed by U.S. Bancorp almost four years earlier. The settlement was implemented in the form of Bonner's Third Amended Plan of Reorganization dated March 9, 1994 (the "Consensual Plan"), which was accepted by U.S. Bancorp on March 2, 1994 and confirmed by the Bankruptcy Court on March 10, 1994.[2]

On March 14, 1994 Bonner filed a Memorandum of Respondent Suggesting that the Case is Moot (the "Memorandum Suggesting Mootness"). On March 15 U.S. Bancorp submitted a Response in which it agreed that the case had become moot and requested that the Court vacate the

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1 *See* Brief of Petitioner at 7 (Feb. 24, 1994).

2 The Consensual Plan and the Bankruptcy Court's Order confirming it were filed with this Court as exhibits to the Memorandum of Respondent Suggesting that the Case is Moot (Mar. 14, 1994) at App. 7-30 and 1-6, respectively.

decision below in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Bonner filed a Reply on March 16, contending that the practice described in *Munsingwear* does not apply to cases that become moot as a result of settlement, not "happenstance." On March 17 U.S. Bancorp filed a Reply in support of its request to vacate, arguing that vacatur is available where mootness results from settlement. This Court took the matter under advisement and directed the parties to brief the first question presented on page i above.

1. U.S. Bancorp provides mortgage services to its bank affiliates, which collectively hold approximately $1 billion in mortgages on properties located in the States within the Ninth Circuit.

Bonner is a general partnership formed for the specific purpose of owning the Mall. The partnership is comprised of six partners: Lloyd Andrews, an individual ("Andrews"), owns 25%, and each of five trusts for the children of H.F. Magnuson ("Magnuson") owns 15% of Bonner. Magnuson is the trustee for each of the trusts.

The Mall was built in 1984 and 1985 by Northtown Investments ("Northtown"), a general partnership, using a $6.3 million loan from First National Bank of North Idaho (the "Mall Loan"). The Mall Loan was evidenced by a note executed by Northtown and secured by a deed of trust on the Mall. U.S. Bancorp acquired the Mall Loan in 1986. Later that year Bonner purchased the Mall from Northtown subject to U.S. Bancorp's lien on the Mall. Bonner never assumed Northtown's indebtedness on the note and has denied any liability to U.S. Bancorp. *See* Brief in Opposition to Petition for Writ of Certiorari at 3. One of Bonner's partners, Andrews, is also a partner of Northtown, *see id.* at 2, and therefore is directly liable for the Mall Loan. In 1988, U.S. Bancorp made a $905,000 loan directly to Magnuson and

Andrews (the "Personal Loan") in connection with an expansion of one of the stores at the Mall. *See* Memorandum Suggesting Mootness at App. 16.

Over the following years, Bonner serviced the debt to U.S. Bancorp but defaulted under the deed of trust by failing to pay (or post a bond pending appeal of) the real property taxes on the Mall. Accordingly, on July 10, 1990 U.S. Bancorp commenced a nonjudicial foreclosure of the Mall.

Between July 1990 and March 1991, Bonner sought U.S. Bancorp's agreement to restructure the debt on the Mall. U.S. Bancorp was willing to restructure both the debt on the Mall and the Personal Loan, provided that any restructured loan satisfy U.S. Bancorp's standard loan term, amortization, interest rate, and loan to value ratio requirements for similar loans and not impair U.S. Bancorp's rights against Northtown and its partners. During those negotiations U.S. Bancorp agreed to postpone the foreclosure sale of the Mall three times, finally resetting the sale for March 14, 1991.

2. On March 13, 1991, Bonner filed a petition under Chapter 11 of the Bankruptcy Code, staying the foreclosure. Following Bonner's bankruptcy, the Personal Loan went into default when U.S. Bancorp refused to apply certain income from the Mall to the Personal Loan and the Bankruptcy Court refused to direct U.S. Bancorp to do so. *See* Pet. App. at A128. U.S. Bancorp's right to foreclose on the security for the Personal Loan, and Magnuson's and Andrews' claims against U.S. Bancorp for breach of contract and various torts relating thereto, have been in litigation in the Idaho State District Court since 1991.

On April 23, 1991 U.S. Bancorp moved for relief from the automatic stay to foreclose its interest in the Mall on the ground, among others, that Bonner could not confirm a plan of reorganization. On August 23, 1991, the Bankruptcy Court

denied relief, subject to the proviso that Bonner propose a plan of reorganization that was not unconfirmable as a matter of law. Pet. App. at A127. The Bankruptcy Court also valued the Mall at $3.2 million. *Id.* at A126.

On October 31, 1991 Bonner filed its Original Plan, which is reprinted at J.A. 2-28. Under the Original Plan, Bonner would transfer all of its assets to a new entity, Bonner Properties, Inc. ("Bonner Properties") in return for Bonner Properties' assumption of certain of Bonner's liabilities. The sole property distributed under the Original Plan with respect to $3.6 million of Bonner's unsecured claims would be Bonner Properties preferred stock having a liquidation preference and aggregate par value of $300,000, and convertible after 32 months into 15% of the then-outstanding shares of Bonner Properties common stock.

The Original Plan did not provide for payments to the holders of all unsecured claims equal to the allowed amount of such claims, *see* 11 U.S.C. § 1129(b)(2)(B)(i), and therefore could be confirmed over the objection of Bonner's unsecured creditors only if the "absolute priority rule" embodied in Section 1129(b)(2)(B)(ii) of the Bankruptcy Code was satisfied. The Original Plan violated the absolute priority rule because Bonner's owners would have retained property under the Original Plan, despite the failure to pay unsecured claims in full.[3] The Original Plan therefore could be confirmed only if there is an exception to the absolute priority rule that permits a debtor's owners to contribute new value to the reorganized debtor in return for the property they receive or retain under the plan of reorganization. Bonner relied on such a "new

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[3] Whether the Original Plan did violate the absolute priority rule is an open issue in the decision below. *See* Pet. App. at A35-43.

value exception" to the absolute priority rule in proposing the Original Plan.

In response to the Original Plan, U.S. Bancorp renewed its motion for relief from stay to foreclose on the Mall or for dismissal of the case on the grounds that there was no new value exception, but if there was such an exception, the Original Plan did not satisfy its requirements. *See* RA 11. The Bankruptcy Court agreed with U.S. Bancorp's first argument and therefore did not reach the second. J.A. 33.

Bonner appealed the decision of the Bankruptcy Court, and the District Court reversed. *See* Pet. App. at A88-117. U.S. Bancorp appealed the District Court's decision to the Court of Appeals for the Ninth Circuit, which affirmed on August 4, 1993. *See* Pet. App. at A1-84. One of the Court of Appeals' primary grounds for affirmance was its belief that qualifying new value plans do not violate the absolute priority rule because they give old equity a stake in the reorganized debtor "on account of" its new value contribution, not on account of its old equity interests. Pet. App. at A33-51.

3. While the dispute concerning the new value exception and the litigation relating to the Personal Loan worked their way through the courts, the parties continued to negotiate with a view toward a possible consensual reorganization. In the months before the Ninth Circuit's decision below, U.S. Bancorp repeatedly reiterated its offer to restructure the debt on the Mall and the Personal Loan in the manner proposed before Bonner's bankruptcy.

After the Ninth Circuit's decision affirming the viability of new value exception plans, U.S. Bancorp continued to challenge Bonner's ability to confirm the Original Plan. On October 8, 1993, U.S. Bancorp submitted a Renewed Motion for Relief from Stay to foreclose on the Mall on the grounds

that Bonner could not propose a feasible plan of reorganization.

Consideration of U.S. Bancorp's Renewed Motion was deferred pending consideration of Bonner's Second Amended Plan of Reorganization, which was superseded by a Third Amended Plan of Reorganization proposed on or about December 17, 1993. As proposed, the Third Amended Plan did not differ materially from the Original Plan and was unacceptable to U.S. Bancorp. On December 30, 1993, the parties submitted written Closing Arguments to the Bankruptcy Court relating to U.S. Bancorp's Renewed Motion for Relief from Stay.

After December 17, 1993, U.S. Bancorp renewed its offer to restructure the debt on the Mall and the Personal Loan, and on or about January 7, 1994, Magnuson, on behalf of Bonner, himself, and Andrews, tentatively agreed to U.S. Bancorp's terms for such restructuring. The tentative agreement was not binding on the parties, required the consent of other parties, and required Magnuson and Andrews to provide unspecified additional collateral acceptable to U.S. Bancorp. The tentative agreement was not a final, binding arrangement, and U.S. Bancorp could not assume that it would be finalized.

4. Magnuson, Andrews, and Bonner performed the conditions precedent to formal acceptance of the proposed restructuring, however, which was implemented in the form of the Consensual Plan. The Consensual Plan is materially more favorable to U.S. Bancorp than the Original Plan in a number of regards. The Original Plan provided for interest-only payments on U.S. Bancorp's secured claim at the lesser of 7% per annum or the rate specified in the Mall Loan (which was below 6.5% in December 1993), or such other rate as set by the Bankruptcy Court. J.A. 11. The Consensual Plan provides for payments of principal (based on a 25-year

amortization) and interest at the rate of 8.75% per annum. Memorandum Suggesting Mootness at App. 16.

The Original Plan gave U.S. Bancorp no security other than the Mall for payment of its $3.2 million secured claim. The Consensual Plan, on the other hand, provides substantial security for Bonner's obligations to U.S. Bancorp in addition to the Mall, and U.S. Bancorp has broad powers under the Consensual Plan to obtain additional collateral as necessary to maintain a loan-to-value ratio of 65% or less. Memorandum Suggesting Mootness at App. 18-19. In addition, Magnuson and Andrews were not directly liable to U.S. Bancorp under the Original Plan. Under the Consensual Plan, they have guaranteed the debt assumed by Bonner Properties. Memorandum Suggesting Mootness at App. 17.

The Original Plan would have allowed Magnuson and Andrews to continue to assert various claims against U.S. Bancorp and defenses in connection with the Personal Loan. The Consensual Plan resolved the litigation, effectively releasing the claims against U.S. Bancorp and acknowledging that the debt on the Personal Loan had grown to $1.1 million. Memorandum Suggesting Mootness at App. 16. By adding the amount of the Personal Loan to the amount of U.S. Bancorp's secured claim against the Mall, U.S. Bancorp will also obtain the benefit of the requirement that Magnuson and Andrews provide U.S. Bancorp such additional collateral as needed to maintain a 65% loan to value ratio on what was the Personal Loan.

The Consensual Plan also gives U.S. Bancorp additional rights in the event of default by Bonner Properties. The Original Plan did not provide for default interest or late charges if Bonner Properties failed to perform its obligations to U.S. Bancorp; under the Consensual Plan, the default rate of interest is 16.75% and Bonner Properties must pay a late charge equal to 10% of any payment that is not made within

ten days after it is due. Memorandum Suggesting Mootness at App. 18. The Consensual Plan also enlarges U.S. Bancorp's remedies after a default by Bonner Properties and broadens the circumstances under which U.S. Bancorp is entitled to exercise such rights. *Compare* Memorandum Suggesting Mootness at App. 17-18 *with* J.A. 11-12.

In contrast to the Original Plan, the Consensual Plan will not release Magnuson, Andrews, and Northtown from deficiency liability following default and execution by U.S. Bancorp on the Mall. *See* J.A. 12 (enforcement by U.S. Bancorp of deed in lieu of foreclosure provided by Bonner Properties under Original Plan would have effect of foregoing any right to a deficiency claim). The Consensual Plan expressly provides that it shall not in any way waive or impair U.S. Bancorp's claims against other entities liable to U.S. Bancorp on the Mall Loan. Memorandum Suggesting Mootness at App. 17, 27.

Under the Consensual Plan, U.S. Bancorp will give up certain benefits provided by the Original Plan. The new loan will have a five-year term, Memorandum Suggesting Mootness at App. 16, instead of 32 months, J.A. 11, and U.S. Bancorp will dismiss with prejudice its action to foreclose on certain property provided by Magnuson and Andrews as security for the Personal Loan, Memorandum Suggesting Mootness at App. 16. In addition, the Consensual Plan does not provide for any distribution of cash or stock to U.S. Bancorp on account of U.S. Bancorp's unsecured claim against Bonner. *Id.* at 17.

As U.S. Bancorp initially required in the negotiations preceding Bonner's bankruptcy, the terms of the Consensual Plan conform to U.S. Bancorp standards for similar new loans. In other words, the terms of the new loan contemplated by the Consensual Plan were set without regard to the posture of Bonner's bankruptcy proceedings or the decision below by the

Ninth Circuit. And although the terms of the Consensual Plan may reflect certain terms desired by Bonner and its principals (*e.g.*, the termination of U.S. Bancorp's efforts to liquidate the collateral for the Personal Loan), the new loan does not compromise U.S. Bancorp's standard lending criteria. The Consensual Plan even provides for Magnuson and Andrews to pay U.S. Bancorp a standard 1% loan fee of $43,000 on the new loan. *See* Memorandum Suggesting Mootness at App. 19.

5. On March 2, 1994, U.S. Bancorp stipulated to confirmation of the Consensual Plan. To confirm the Consensual Plan, however, Bonner had to obtain the consent of First Security Bank, N.A. ("First Security") to grant U.S. Bancorp a junior lien of certain property encumbered by First Security and make a variety of significant concessions to First Security. *Compare* Memorandum Suggesting Mootness at App. 4-6 *with id.* at App. 19-20. There thus was no assurance at any time prior to the confirmation of the Consensual Plan on March 10, 1994 that the settlement between U.S. Bancorp and Bonner would be implemented.

In connection with the confirmation of the Consensual Plan, Bonner obtained U.S. Bancorp's consent not to contest the mootness of the new value exception issue in this case. The parties did not, however, discuss or reach any agreement relating to vacatur of the decisions below.

SUMMARY OF THE ARGUMENT

The Court should vacate the decisions below in this case based on both the general practice described in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and the particular facts and circumstances of this case.

Munsingwear supports the routine grant of vacatur in cases that become moot as a result of settlement because it indicates that vacatur would have been available in that case to

the petitioner, if it had been properly requested, despite the petitioner's sole responsibility for the case becoming moot. *Munsingwear* does not require that mootness result from happenstance for vacatur to be granted.

This interpretation of *Munsingwear* is supported by reference to its antecedents, and particularly *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936) (per curiam), and *Stewart v. Southern Ry.*, 315 U.S. 784 (1942) (per curiam) (mem.). In *Duke Power* the Court vacated the decisions below, even though the petitioner was solely responsible for the case becoming moot. In *Stewart* the Court vacated its own decision on the merits on account of mootness resulting from the parties' settlement.

The Court's subsequent practice also confirms this interpretation of *Munsingwear* and demonstrates that vacatur is appropriate in cases that become moot as a result of the petitioner's unilateral action or voluntary settlement by the parties.

Karcher v. May, 484 U.S. 72 (1987), does not contradict petitioner's interpretation of *Munsingwear* and did not alter the Court's vacatur practice. That case involved the purposeful withdrawal of an appeal; it was not dismissed on account of mootness. Other decisions of the Court that are contemporaneous with *Karcher* demonstrate that vacatur was still available where mootness was not a result of happenstance. *See United States v. Galioto*, 477 U.S. 556 (1986); *Lake Coal Co. v. Roberts & Schaeffer Co.*, 474 U.S. 120 (1985) (per curiam) (mem.). Since *Karcher*, the Court has continued to dispose of cases that become moot as a result of settlement in accordance with *Munsingwear*. *See, e.g., Continental Casualty Co. v. Fibreboard Corp.*, 113 S. Ct. 399 (1992) (mem.); *City Gas Co. of Fla. v. Consolidated Gas Co. of Fla.*, 499 U.S. 915 (1991) (mem.).

Sound policy considerations support express application of the *Munsingwear* rule to cases that become moot in this Court as a result of settlement. Vacatur in this context promotes equity between the parties *inter sese* and between the parties and the rest of the world.

Vacatur also serves prudential purposes and the judiciary by clearing the path for the fullest possible debate pending this Court's resolution of issues worthy of certiorari. In such cases, routine vacatur is justified because the decisions below are only preliminary in the statutory scheme and do not warrant the presumption of correctness that attaches to other decisions.

Properly exercised by this Court, vacatur does not deprive the public of the benefits of a vacated decision because the persuasive force, if any, of the decision remains. Vacatur also should not create disrespect for the courts if it remains under the Court's control, not the parties', and is withheld in circumstances where it would be inappropriate.

The particular facts and circumstances of this case also warrant vacatur, irrespective of the Court's determination whether the *Munsingwear* rule should generally apply to cases that become moot as a result of settlement. The Court should exercise its discretion to vacate the decisions below in this case because U.S. Bancorp's interest in vacatur greatly outweighs Bonner's interest, if any, in preserving the decisions below; the settlement was not calculated to vitiate precedent; Bonner is responsible for the timing of the settlement; and the decisions below only address legal issues without resolving any factual dispute or applying the law to the facts of this case.

ARGUMENT

I. The *Munsingwear* Rule Properly Extends to Cases That Become Moot in This Court as a Result of Voluntary Settlement by the Parties

A. The *Munsingwear* Rule Already Extends to Cases That Become Moot as a Result of Settlement

The routine practice of vacatur after mootness—the so-called "*Munsingwear* rule"—has long extended to cases that become moot in this Court as a result of settlement. Some cases, such as *Munsingwear* itself, implicitly support the practice of vacatur in cases that are settled. Other cases decided before and since *Munsingwear* expressly apply vacatur to cases that become moot as a result of settlement.

Before examining these cases, it is helpful to identify the four different ways that cases become moot: by unilateral action of the petitioner, by unilateral action of the respondent, by happenstance events attributable to neither party, and by bilateral action of the petitioner and the respondent, such as a settlement. Each of these situations presents different equitable and prudential considerations and has been treated by courts in a distinct fashion.

For immediate purposes, it is important to recognize that cases which become moot as a result of settlement present more compelling grounds for vacatur than cases which become moot as a result of the petitioner's unilateral action. In the former cases, both petitioner and respondent are responsible for the mootness, and it therefore is fairer to the respondent to vacate the decision below than in cases where the petitioner is solely responsible for mootness. In addition, the respondent's participation in a settlement suggests that the decision below

may be less reliable than the decision below in a case where the respondent refuses to settle with the petitioner.

1. *Munsingwear* Itself Did Not Require Happenstance

In *United States v. Munsingwear*, 340 U.S. 36 (1950), this Court was not requested to vacate a lower court decision: it was asked to reverse the holding that a District Court's decision on a claim for an injunction was res judicata as to two treble damages claims. As such, the *Munsingwear* Court did not attempt to define when vacatur is and is not justified in moot cases. Nevertheless, the Court's statement in *Munsingwear* that vacatur "clears the path for future relitigation of the issue between the parties and eliminates a judgment, review of which was prevented through happenstance," 340 U.S. at 40, has been taken by many to mean that vacatur is appropriate only in cases that become moot as a result of events beyond the petitioner's control. *See, e.g., United States v. Garde*, 848 F.2d 1307 (D.C. Cir. 1988). This interpretation of *Munsingwear* attaches undue importance to the Court's casual reference to happenstance and disregards both the cause of mootness in that case and the *Munsingwear* Court's clear suggestion that vacatur would have been available in that case had it been properly requested. The facts in *Munsingwear* make this clear.

Shortly before the end of World War II, Chester Bowles, Administrator of the United States Office of Price Administration (the "OPA"), sued Munsingwear for an injunction and treble damages for selling fall and winter underwear at prices that allegedly violated the OPA's Maximum Price Control Regulation No. 221 under the Emergency Price Control Act of 1942. *See Bowles v. Munsingwear, Inc.*, 63 F. Supp. 933, 934-36 (D. Minn. 1945). The parties agreed that the damages claim should be held in abeyance pending trial and final determination on the

injunction claim. *Id.* at 935. Munsingwear won on the merits, *id.* at 938, and the United States appealed.

After the war ended, while the United States' appeal was pending, an Executive Order was issued annulling the relevant price controls and transferring Bowles' authority to Phillip Fleming, Administrator of the new Office of Temporary Controls. *See Fleming v. Munsingwear, Inc.*, 162 F.2d 125, 127 (8th Cir. 1947) (attributing Order to President Truman); *United States v. Munsingwear, Inc.*, 178 F.2d 204, 205 (8th Cir. 1949) (attributing Order to the Price Administrator). Munsingwear then moved for dismissal of the appeal on the grounds that the Executive Order annulling the regulations mooted the action. 162 F.2d at 126. The Court of Appeals agreed. *Id.* at 127. The United States made no further direct challenge to the District Court's decision or the Court of Appeal's dismissal, either by way of appeal or motion for vacatur. *See* 178 F.2d at 205-06; *Munsingwear*, 340 U.S. at 40.

Following dismissal of the appeal, Munsingwear moved the District Court to dismiss the treble damages portion of the action and a second treble damages action for violation of the same OPA regulation during the year after commencement of the first action, both of which had been held in abeyance while the injunctive portion of the first action was pending. 178 F.2d at 205. The District Court dismissed the actions on the grounds that they raised the same issues as were resolved in the injunctive portion of the first action, *id.* at 205-06, and that the unreversed judgment of the District Court in the injunction suit was res judicata of the treble damages claims. *Id.* at 206; 340 U.S. at 37.

A divided panel of the Eighth Circuit affirmed, with the majority finding that the Court of Appeals' dismissal of the United States' first appeal did not emasculate the District Court's dismissal on the merits. 178 F.2d at 209. "The

dismissal of the appeal merely constituted a refusal to entertain an appeal in a case which this Court believed to have become moot." *Id.* The Court of Appeals distinguished the situation in *Leader v. Apex Hosiery Co.*, 108 F.2d 71 (3d Cir. 1939), *aff'd*, 310 U.S. 469 (1940), in which this Court directed that the dismissal on account of mootness of the plaintiff's complaint in an earlier proceeding, *Leader v. Apex Hosiery Co.*, 302 U.S. 656 (1937), was regarded as tantamount to a vacation of the appellate decree below. 178 F.2d at 207.

The United States petitioned this Court to reverse the Court of Appeals' decision on the grounds that res judicata should not apply to cases that become unreviewable because of mootness. *Munsingwear*, 340 U.S. at 39. This Court refused to create such an exception because the United States had acquiesced in the dismissal of its first appeal without requesting vacatur of the District Court's judgment. *Id.* at 40. Any hardship suffered by the United States as a result of the District Court's unreviewed decision was thus the United States' own fault. This Court emphasized that vacatur is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

Id. at 39. In support of this statement, the Court cited dozens of cases of vacatur after mootness, *id.* at 40 n.2; "This has become the standard disposition in federal civil cases." *Id.*

Munsingwear thus clearly involved a case of mootness resulting from the unilateral action of the petitioner. The only reason for mootness cited by the Court of Appeals was the Executive Order annulling the OPA's Maximum Price Control Regulation No. 221. *See* 162 F.2d at 127. Happenstance played no role whatsoever in mooting the case.

Despite the petitioner's sole responsibility for mooting the case, the Court indicated that the United States could have obtained vacatur of the District Court's decision if it had timely moved the Court of Appeals to do so:

> If there is hardship in this case it was preventable. . . .
>
> In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. Denial of a motion to vacate could bring the case here.

340 U.S. at 39-40. These statements strongly suggest that the *Munsingwear* Court would have vacated the first District Court decision if vacatur had been timely requested by the United States and refused by the Court of Appeals.

If the Court would have granted vacatur in *Munsingwear*, where the petitioner was solely responsible for mootness, then it almost certainly would have granted vacatur if the petitioner and respondent were jointly responsible for mootness. *Munsingwear* therefore supports the vacatur of decisions that become moot as a result of settlement.

2. *Munsingwear*'s Antecedents Did Not Require Happenstance

Munsingwear's antecedents contradict the interpretation of that case that attaches any weight to the Court's reference to happenstance. Prior to *Munsingwear*, no decision of this Court ever referred to happenstance in connection with vacatur.[4] To the contrary, review of the cases that preceded *Munsingwear* confirms the absence of a happenstance requirement and supports the implication in that case that vacatur should have been granted to the United States if it had been properly requested. More to the point, four of the examples of vacatur cited with approval in *Munsingwear* were cases that became moot as a result of settlement.[5]

The primary authority cited in *Munsingwear* in connection with vacatur, *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936) (per curiam), remains a leading authority on vacatur, *see Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and demonstrates the Court's practice of vacating decisions rendered moot by the appellant's unilateral action.

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4 This statement is based on a LEXIS search (GENFED library, US file) for "happenstance and vacat! and date(bef 1951)," which identified only the *Munsingwear* decision.

5 *See* Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 80 n.9 (1955) (identifying settlement as the cause of mootness in the following cases where vacatur was granted: *SEC v. Philadelphia Co.*, 337 U.S. 901 (1949); *SEC v. Engineers Pub. Serv. Co.*, 332 U.S. 788 (1947); *Farmers Grain Co. v Brotherhood of Locomotive Firemen & Enginemen*, 332 U.S. 748 (1947); *Hammond Clock Co. v. Schiff*, 293 U.S. 529 (1934)). *Cf. Stewart v. Southern Ry.*, 315 U.S. 784 (1942) (per curiam) (mem.), *vacating* 315 U.S. 283 (not cited in *Munsingwear*).

In *Duke Power* the plaintiff electric utilities sued the County to enjoin construction of a power plant with the proceeds of a federal loan made pursuant to a 1934 contract. 299 U.S. at 261. Harold Ickes, Federal Emergency Administrator of Public Works, intervened as a defendant on behalf of the Public Works Administration. *Id.* The District Court enjoined the defendants from making the loan on the grounds that the act authorizing the loan was unconstitutional. *Id.*

The defendants appealed the District Court decision, but while the appeal was pending, Ickes advised the Court of Appeals that the 1934 contract had been terminated and replaced with a new contract that omitted the offensive provisions. *Id.* at 261-62. The Court of Appeals remanded with an ambiguous order that left uncertain the effect of its ruling on the District Court's decision. *Id.* at 262. The District Court, failing to interpret the Court of Appeals' order as tantamount to a vacatur of the District Court's former decree, retried only a few issues in the case and held that its original decree should not be set aside. *Id.* at 267. The Court of Appeals reached the merits of the case and reversed. *Id.*

This Court reversed the Court of Appeals' decision, holding that the Court of Appeals had acted improperly by not vacating the decision below when the case became moot. *Id.* at 267. "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Id.* at 267 (citations omitted).

The termination and replacement of the 1934 contract appears to have been solely attributable to the Federal Government and the County, with no involvement by the power companies. Thus, like *Munsingwear*, the *Duke Power* case involved unilateral conduct by the petitioner resulting in mootness. But *Duke Power* indicates that the Court had no

concern about the appellants' role in mooting the case and makes no reference to happenstance.

This Court's use of vacatur in moot cases before *Munsingwear* compounds the improbability that the *Munsingwear* Court intended, by its single, off-hand reference to happenstance, to change its vacatur practice. Happenstance thus was not required for vacatur in either the *Munsingwear* case or those that preceded it. Nor has it been required since.

3. *Munsingwear*'s Progeny Have Not Required Happenstance

This Court has not changed its approach to vacatur in moot cases after *Munsingwear*. It has continued to grant vacatur in moot cases without regard to whether mootness was a result of happenstance or events within the parties' control. Accordingly, the Court has granted vacatur in a number of cases that have become moot as a result of the settlement by the parties.[6] These cases provide further proof that *Munsingwear* did not add a happenstance requirement to this Court's vacatur doctrine.

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[6] *See, e.g., Continental Casualty Co. v. Fibreboard Corp.*, 113 S. Ct. 399 (1992) (mem.); *City Gas Co. of Fla. v. Consolidated Gas Co. of Fla.*, 499 U.S. 915 (1991) (mem.); *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (mem.); *Pierce v. Ross*, 455 U.S. 1010 (1982), and *Pierce v. Abrams*, 455 U.S. 1010 (1982) (facts of settlement recited in *Pierce v. Underwood*, 487 U.S. 552, 556 (1988), and *Dubose v. Harris*, 82 F.R.D. 582, 592-605 (D. Conn. 1979)); *United States v. Leiter Minerals, Inc.*, 381 U.S. 413 (1965) (facts of settlement recited in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 590 (1973)); *Baltimore & O.R.R. v. Atchison, T. & S.F. Ry.*, 383 U.S. 832, 833 (1966), and *United States v. Atchison, T. & S.F. Ry.*, 384 U.S. 888 (1966) (facts of settlement recited in *Chicago & N.W. Ry. v. Atchison, T. & S.F. Ry.*, 387 U.S. 326, 340 (1967)); and *Managed Funds, Inc. v. Brouk*, 369 U.S. 424 (1962) (facts of settlement recited in *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 793 n.6 (8th Cir. 1967)).

This Court's practice of granting vacatur in cases that become moot as a result of settlement was reinforced by its disposition of *Board of Regents of the Univ. of Tex. Sys. v. New Left Educ. Project*, 414 U.S. 807 (mem.), *vacating* 472 F.2d 218 (5th Cir. 1973). In the *New Left* case, the Fifth Circuit was asked to review a District Court order granting declaratory and injunctive relief with respect to two Board of Regents rules applicable at the University of Texas. 472 F.2d at 219. While the Regents' appeal was pending, the Regents repealed and replaced the rules, mooting the case. *Id.* at 219-20. New Left claimed that it was entitled to at least the declaratory portion of their judgment as to the old rules. *Id.* at 220.

The Court of Appeals noted the *Munsingwear* rule of routinely vacating moot judgments, but found that "here we have a case where the appeal has become moot, not because of 'happenstance', but through action of the appellant. This being so, we think that a different approach is required." *Id.* at 220-21. Accordingly, vacatur was denied. *Id.* at 222.

This Court granted certiorari, vacated the judgment, and remanded the *New Left* case to the District Court with instructions to dismiss. 414 U.S. 807. In other words, this Court applied the *Munsingwear* rule to a case that clearly did not involve happenstance.

This Court's apparent rejection of the Fifth Circuit's interpretation of *Munsingwear* in the *New Left* case is consistent with the Court's disposition of *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975), and *United States v. Galioto*, 477 U.S. 556, 560 (1986). In each of those decisions the Court applied the *Munsingwear* rule to a case rendered moot by the petitioner's unilateral action. *See also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 & n.9 (1982) (suggesting that the *Munsingwear* rule would have been

available in similar circumstances in that case if Court of Appeals was advised of facts).

Notwithstanding various Courts of Appeal's interpretations of *Munsingwear* to the contrary, *see Oklahoma Radio Assocs. v. FDIC*, 3 F.3d 1436, 1439-44 (10th Cir. 1993) (surveying practices of different Circuits), this Court has never stated that the *Munsingwear* rule applies only to cases that become moot as a result of happenstance. The only suggestion in any decision of this Court to the contrary is found in *Karcher v. May*, 484 U.S. 72 (1987).

4. *Karcher* Does Not Apply to Cases That Become Moot as a Result of Settlement

This Court's decision in *Karcher* has no bearing on the disposition of cases that become moot as a result of settlement. The *Karcher* case concerned a statute, enacted by New Jersey's 200th Legislature over the Governor's veto, that required public school teachers to permit students to observe a minute of silence at the beginning of each school day. *Id.* at 74-75. The statute appeared so clearly unconstitutional that the New Jersey Attorney General immediately announced that he could not defend it in good conscience if it were challenged. *Id.* at 75; *May v. Cooperman*, 572 F. Supp. 1561, 1563 (D.N.J. 1983).

Within a month a teacher (May) and certain students and their parents commenced an action for declaratory and injunctive relief against Saul Cooperman, the Commissioner of the State's Department of Education and the plaintiffs' local Board of Education. 572 F. Supp. at 1562. The named defendants did not actively oppose the action. *Id.* at 1563. Instead, the law was defended by Alan Karcher and Carmen Orechio, as Speaker of the General Assembly and as President of the Senate of New Jersey's 200th Legislature, respectively,

as intervenors. *Id.; May v. Cooperman*, 780 F.2d 240, 242 (3d Cir. 1985). After trial, the District Court concluded that the statute violated the First Amendment in that it did not have a bona fide secular purpose and in fact had a religious purpose; that it both advanced and inhibited religion; and that it fostered an excessive government entanglement with religion. 572 F. Supp. at 1574-76.

Karcher and Orechio appealed the decision in their official capacity as representatives of the 200th Legislature. *See* 780 F.2d at 240, 241. A divided panel of the Court of Appeals for the Third Circuit affirmed. *Id.* at 253.

In January 1986, one month after the Court of Appeals' decision, New Jersey's 202nd Legislature convened and Karcher and Orechio lost their official posts to Charles Hardwick and John Russo. 484 U.S. at 76. Nevertheless, Karcher and Orechio filed a notice on behalf of the Legislature appealing the Court of Appeals' judgment. *Id.* By letter dated May 6, 1986, appellant's counsel informed the Court that Hardwick and Russo were withdrawing the Legislature's appeal, but that Karcher desired to continue the appeal. *Id.* Appellees responded with a Motion to Dismiss or Affirm. *Id.*[7]

The Court held that Karcher and Orechio had participated in the litigation in their official capacities as presiding officers of the Legislature, but having lost their offices lacked authority to pursue the appeal. 484 U.S. at 81.

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[7] The 202nd Legislature actually wanted to preserve the decision below. As Hardwick explained in a May 2, 1986 letter to appellees' counsel, "If . . . our nation's highest court decides that the legislation requiring teachers to permit a moment of silence is constitutional, then our state's school children and teachers would be saddled with a practice of questionable value that may even be counterproductive to sound educational practices." App. to Motion to Dismiss or Affirm.

Accordingly, the appeal was required to be dismissed for want of jurisdiction. *Id.*

Karcher and Orechio argued that if the Court dismissed the appeal, it also should vacate the judgments below pursuant to the *Munsingwear* rule. *Id.* at 81-82. The Court disagreed:

> Karcher and Orechio contend that the rationale underlying the *Munsingwear* procedure applies to this case, for it is the happenstance of their loss of official status that renders the judgment unreviewable.
>
> We reject this argument because its underlying premise is wrong. This case did not become unreviewable when Karcher and Orechio left office. . . .
>
> This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.

Id. at 82-83. *Karcher* did not engraft a happenstance requirement onto the *Munsingwear* rule. The Court did not even reach its doctrine regarding mootness and vacatur in *Karcher;* instead, it stopped at the threshold of the doctrine on the grounds that the appeal was withdrawn, not dismissed as moot. *Contra Manufacturers Hanover Trust Co. v. Yanakas,* 11 F.3d 381, 383 (2d Cir. 1993). The *Munsingwear* rule was simply "inapplicable." 484 U.S. at 83; *accord Long Island Lighting Co. v. Cuomo,* 888 F.2d 230, 234 n.4 (2d Cir. 1989).

The Court also did not raise the issue of responsibility for the case being unreviewable; it merely repeated and rejected Karcher's and Orechio's claim that the case had become unreviewable due to circumstances unattributable to any of the parties. The references to happenstance therefore should be attributed to their source—Karcher and Orechio—not the Court.

Moreover, to read *Karcher* as requiring the petitioner to have no responsibility for mootness in order for the *Munsingwear* rule to apply would directly contradict two of the Court's decisions in as many years preceding *Karcher* in which the Court actually applied the *Munsingwear* rule without regard to the petitioners' contribution to mootness. For example, in *Galioto,* 477 U.S. 556, decided one year before *Karcher*, the petitioner, the United States, was solely responsible for the amendment of a statute that rendered the case moot, yet the *Munsingwear* rule was applied. *Id.* at 559-60. And a year earlier in *Lake Coal*, 474 U.S. 120, the Court vacated the judgment below where mootness resulted from a settlement.

* * *

In neither *Munsingwear* nor *Karcher* did the petitioner move to vacate on account of mootness, and neither case supports the proposition that vacatur should be limited to cases that become moot as a result of happenstance. To the contrary, *Munsingwear* strongly suggests, in harmony with *Duke Power* and numerous other cases decided before, after, and between *Munsingwear* and *Karcher,* that vacatur should be available in even the extreme case where the petitioner is solely responsible for the case becoming moot. *Karcher* simply does not speak to the *Munsingwear* rule.

B. Sound Policy Considerations Support Vacatur in Cases That Become Moot in This Court as a Result of Settlement

This Court's consistent practice of granting vacatur in cases that become moot as a result of settlement should be expressly affirmed based on both equitable and prudential considerations.

Before examining these considerations, it is useful to recall the four circumstances that lead to mootness: unilateral action by the petitioner, unilateral action by the respondent, happenstance, and bilateral action of the petitioner and the respondent, such as settlement. This case presents the question whether cases that become moot as a result of bilateral action should be treated like cases that become moot as a result of happenstance or like cases that become moot as a result of unilateral action by the petitioner.

Cases that become moot as a result of unilateral action by either party can be resolved easily on equitable grounds. Where unilateral action by the party that lost below moots the case, the Courts of Appeal typically refuse vacatur out of fairness to the prevailing party. *See, e.g., Cover v. Schwartz,* 133 F.2d 541, 547 (2d Cir. 1942), *cert. denied,* 319 U.S. 748 (1943); *Wisconsin v. Baker,* 698 F.2d 1323, 1330-31 (7th Cir. 1983). *But see supra* pp. 19, 22 (examples of vacatur granted by this Court in cases of unilateral mootness by petitioner).[8]

Alternatively, where unilateral action by the prevailing party prevents the losing party from obtaining review, courts have generally vacated decisions below because of the

[8] The fact that cases which become moot under such circumstances are not always vacated indicates that other considerations are at work in this area. *See infra* pp. 30-31.

unfairness of allowing an unreviewable decision to have collateral consequences. *Penguin Books USA Inc. v. Walsh,* 929 F.2d 69, 73 (2d Cir. 1991) (vacating judgment *sua sponte*).

Under any interpretation of *Munsingwear,* lower court decisions in cases that become moot in this Court as a result of happenstance should be vacated; Bonner concedes as much in its Reply to Response of Petitioner (Mar. 16, 1994). Under such circumstances, vacatur typically is justified because the petitioner has been deprived of review through no fault of its own. *See Munsingwear,* 340 U.S. at 40.

By comparing and contrasting cases of bilateral mootness to the other three types of moot cases, certain equitable and prudential considerations come into sharper focus.

1. Cases that Become Moot as a Result of Settlement Should Be Vacated for Equitable Reasons

Equity strongly supports application of the *Munsingwear* rule to cases that become moot as a result of settlement. Two different equitable considerations are involved: equity between the parties *inter sese* and equity between the parties and the rest of the world.[9]

As between the parties, it clearly is equitable to apply the *Munsingwear* rule to cases that are settled. Such a practice is fair to the respondent in that it has participated in rendering

[9] The following analysis of equitable considerations between the parties and the rest of the world excludes systemic interests in preserving judgments (such as maintaining respect for the courts), which are addressed in the context of the prudential justification for vacatur. *See infra* pp. 30-38.

the case moot. Viewed from the parties' perspective, this situation much more nearly resembles mootness resulting from happenstance (for which vacatur routinely is granted) than mootness resulting from unilateral action by the petitioner (for which vacatur sometimes is denied). From an equitable perspective, the model applied to cases of happenstance fits much more closely.

Vacatur in cases that are settled also is fair as between the parties because it returns them to the status quo ante, except to the extent that they have consented to the modification of their respective rights. Vacatur thus leaves the parties in equipoise in that neither petitioner nor respondent obtains the benefit of the judgment or precedent that is vacated.

As between the parties and the rest of the world, it would be grossly unfair to the actual parties to refuse vacatur in order to advance the interests of third parties where mootness results from settlement. Third parties can, no doubt, have a significant interest in the collateral effects of a judgment. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). But those who do not participate in a case, incurring no expenses and taking no risk that they might be bound by an adverse judgment, have earned no equitable stake in its outcome.

Placing third parties' interests in a judgment ahead of a petitioner's interest in vacatur would injure both petitioners and respondents. Petitioners would be faced with the dilemma between refusing a favorable settlement and being saddled with an unreviewable adverse decision. Respondents would also suffer if petitioners were forced to litigate against their will in order to avoid the effect that settlement and mootness would have on claims by third parties. There is simply "no justification to force [parties], who wish only to settle the present litigation, to act as unwilling private attorneys general

and to bear the various costs and risks of litigation." *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280, 284 (2d Cir. 1985); *accord Federal Data Corp. v. SMS Data Prods. Group*, 819 F.2d 277, 279 (Fed. Cir. 1987).

2. Prudential Considerations Support Vacatur in Cases That Become Moot in This Court Because of Settlement

Vacatur by this Court does more than advance equity: it also has a prudential function. Vacatur serves the Federal Courts by clearing the path for the fullest possible debate pending this Court's resolution of issues worthy of certiorari, and thereby aids this Court. In such cases, vacatur also frees the lower courts from following appellate decisions which in the statutory scheme are only preliminary and may not be correct. Properly exercised by this Court, vacatur does not deprive the public of the benefits of a vacated decision or create disrespect for the courts.

a. Vacatur Has a Prudential Aspect

This Court's use of vacatur cannot be explained on equitable principles alone. If the sole purpose of vacatur in moot cases were to avoid prejudice to a petitioner where review of a decision is prevented through happenstance, vacatur would never be granted in cases mooted by the petitioner's unilateral action. As described above, however, vacatur has been alluded to or ordered by this Court a number of times in such circumstances. Prudential considerations help explain the exercise of this Court's vacatur power in such cases.

Vacatur performs various prudential functions. The duty to vacate is strongest in constitutional cases, where the

avoidance doctrine dictates vacatur. *See Kremens v. Bartley*, 431 U.S. 119, 133-34 & n.15 (1977) (quoting *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)). Vacatur also is particularly appropriate where retention of a precedent would create a gratuitous conflict with a co-equal branch of government. *Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (en banc). More generally, "Where difficult issues of great importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we 'promote respect for the Court's adjudicatory process [and] the stability of [our] decisions.'" *Illinois v. Gates*, 462 U.S. 213, 224 (1983) (describing this Court's prudential refusal to resolve questions not pressed or passed upon below) (quoting *Mapp v. Ohio*, 367 U.S. 643, 677 (1961)).

The prudential aspect of vacatur makes sense of the Court's statement in *Duke Power* that "it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss" in moot cases. 299 U.S. at 267. *See also Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam) (singularly emphasizing "duty" to vacate).

b. Decisions Below in Certworthy Cases Are Neither Final nor Presumptively Correct

The propriety of vacating a decision depends in part on two related factors, both of which vary according to the procedural posture of a case: whether a decision "in the statutory scheme [is] only preliminary," *Munsingwear*, 340 U.S. at 40; and the appropriateness of attaching presumptive correctness to the decision. These factors change dramatically at different levels of the Federal Courts and reveal that vacatur

of Court of Appeals decisions in moot cases before *this* Court is particularly appropriate.

Where parties seek vacatur of a final District Court decision, the decision proposed to be vacated is "only preliminary" because the losing party can appeal as a matter of right. *See* 28 U.S.C. § 1291. On the other hand, District Court decisions are properly viewed as "presumptively correct," *Izumi*, 114 S. Ct. at 431 (Stevens, J., dissenting), based in part on the overall reversal rate in private civil cases well below 20%. *See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589, 595 n.25 (1991) (citing studies).

Ordinarily it would appear to be less appropriate to vacate Court of Appeals decisions than District Court decisions because the former enjoy a stronger presumption of validity, based in part on the unavailability of review as a matter of right. *See Yanakas*, 11 F.3d at 384 (distinguishing between vacatur of such decisions based on availability of right of review). When a party seeks review of a Court of Appeals decision, it is likely to be disappointed. According to *U.S. Law Week*'s statistical recap of this Court's workload during the last three terms, just under 90% of all "paid" certiorari petitions acted upon by the Court in each of the last three terms have been denied, dismissed or withdrawn. 62 U.S.L.W. 3124 (Aug. 17, 1993). In these cases, "the loser has received all of the appellate review to which he is entitled." *Clarke*, 915 F.2d at 710 (en banc) (dissenting opinion).

Court of Appeals decisions warranting review by this Court ("certworthy" cases), however, are another matter. Of the 106 cases reviewed on writ of certiorari and decided with a full opinion during the 1992 Term, the Court reversed 56 (53%), vacated in whole or in part 11 (10%), and affirmed

only 39 (37%). *The Supreme Court, 1992 Term*, 107 Harv. L. Rev. 27, 376 (1993). In the 1991 Term, fewer than 32% of such cases were affirmed. *The Supreme Court, 1991 Term*, 106 Harv. L. Rev. 19, 382 (1993). A sharp contrast thus emerges between Court of Appeals decisions that are, and those that are not, certworthy. In the former case, the decision is preliminary and likely to be reversed; in the latter, it is final and not subject to reversal.

This Court appears to follow the distinction between Court of Appeals decisions that are certworthy and those that are not proposed by the United States in *Velsicol Chem. Corp. v. United States*, 435 U.S. 942 (1978) (mem.) (denying certiorari without vacating moot case). *See generally Clarke*, 915 F.2d at 713-14 (dissenting opinion). The *Velsicol* procedure of vacating certworthy cases and dismissing the others should be followed in this case to allow the Bankruptcy Courts, District Courts, and Bankruptcy Appellate Panel of the Ninth Circuit to adopt or reject the Court of Appeals' reasoning in the *Bonner Mall* case.

c. Vacatur Aids This Court's Analysis of Difficult Issues

Vacating a moot decision, and thereby leaving an issue worthy of certiorari temporarily unresolved in a Circuit, can facilitate the ultimate resolution of the issue by encouraging its continued examination and debate. The value of leaving important issues unresolved is illustrated by the debate within the Seventh Circuit over survival of the new value exception.

In a 1986 case, *Official Creditors' Comm. ex rel. Class 8 Unsec. Creditors v. Potter Material Serv., Inc. (In re Potter Material Serv., Inc.)*, 781 F.2d 99 (7th Cir. 1986), a panel of the Seventh Circuit assumed without deciding that there was a new value exception under the Bankruptcy Code. *Id.* at 101. A second panel of the Seventh Circuit went out of its way in

In re Stegall, 865 F.2d 140, 142 (7th Cir. 1989), to emphasize that the *Potter* decision was not binding, allowing a third panel of that Court of Appeals to reexamine the exception in *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1361, *reh'g and reh'g en banc denied* (7th Cir. 1990). Though the bank in that case urged the court to resolve the new value issue and the panel argued strongly against the exception, it too stopped short of rendering a decision on the issue. *Id.* at 1362. The refusal to allow this difficult issue to be decided prematurely in both *Stegall* and *Kham & Nate's* left the path for future litigation open in *Snyder v. Farm Credit Bank of St. Louis (In re Snyder)*, 967 F.2d 1126 (7th Cir. 1992), where a fourth panel of the Seventh Circuit weighed in with a forceful defense of the new value exception and again refused a request (this time by both parties) to resolve the issue once and for all for the Circuit. *Id.* at 1130-31.

The Seventh Circuit's prudent self-restraint in these cases prevented the *Potter* decision from foreclosing the analysis in *Kham & Nate's*, which itself allowed for the discussion in *Snyder*. The result of that Court of Appeals' practice has been to produce two thoughtful arguments about the new value exception, one for and one against. It seems unlikely that both of these valuable opinions would have been generated in had the Seventh Circuit's practice been to rush to resolution of the new value issue.

The same process of give and take that has occurred in the Seventh Circuit will be foreclosed in the Ninth Circuit if the Court of Appeals' decision below is not vacated. The decision in this case will bind future panels of the Ninth Circuit and its Bankruptcy Appellate Panel, as well as the Circuit's Bankruptcy and District Courts, until such time as an en banc decision of the Ninth Circuit, a decision of this Court, or new legislation undermines the *Bonner Mall* decision. *See United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989); *see also United States v. Shabani*, 993 F.2d 1419, 1421

(9th Cir. 1993) (refusing to call for an en banc review of seemingly contradictory Ninth Circuit opinions in conflict with every other Circuit unless Ninth Circuit decisions irreconcilable).

The binding effect of the decision will not preclude more vocal judges in the Circuit from making known in dicta their thoughts about the new value exception, but it is likely to have a chilling effect for two reasons. First, creditors are unlikely to challenge the *Bonner Mall* decision, given the certainty that they will lose twice before they can even reach the Ninth Circuit, where they will have to struggle to obtain en banc review. Second, the lower courts in the Circuit will be less likely to devote resources to analysis of the issue, it having been conclusively decided for them. As a result, the Courts of the Ninth Circuit will probably watch from the sidelines as other Circuits advance the new value exception debate.

d. Vacatur Does Not Negate the Benefits of Sound Decisions

Mere vacatur of decisions does not deprive the public of the benefits of sound decisions or waste judicial resources. Vacatur must be distinguished from withdrawal, de-publication, and expungement of decisions. These practices erase decisions from reporters, depriving future courts and litigants of their reasoning and wasting the resources that were invested in them.[10] All that is necessarily entailed in vacatur is the

[10] An example of what can be lost through withdrawal of a decision is found in *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 948 F.2d 134 (5th Cir. 1991), *withdrawn in part on reh'g and republished as amended*, 995 F.2d 1274 (1992) (per curiam) (Jones, J., dissenting from withdrawal), *cert. denied*, 113 S. Ct. 72. The withdrawn part of the decision appears to have survived inadvertently.

elimination of the binding or preclusive effect of a decision. Henry E. Klingeman, *Settlement Pending Appeal: An Argument for Vacatur*, 58 Fordham L. Rev. 233, 246 (1989).

To the extent that a persuasive decision is vacated but not withdrawn, its analysis is still available for use by other courts. William D. Zeller, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 Yale L.J. 860, 862-63 n.23 (1987); Fisch, *supra*, at 629 n.204 (citing cases following reasoning of vacated decisions). A vacated decision thus is not wasted because the public can reap the benefits of its reasoning without tying the hands of future courts. The persuasive force as precedent does not vanish on vacatur. *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988).[11]

The value of nonbinding reasoning is demonstrated in this case in connection with the new value exception issue previously briefed. The Seventh Circuit's analysis of the new value exception in *Snyder*, which is not a binding decision, contributed significantly to the Ninth Circuit's decision below. *See* Pet. App. A54, A60, A73 (relying solely on *Snyder* for various propositions). By contrast, the Sixth Circuit's decision in *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581 (6th Cir. 1986), which the Ninth Circuit read as a binding resolution of the new value question in that Circuit, Pet. App. A29-30 n.19, contributed little to the Court of Appeals' analysis below. *See* Pet. App. A36 (also citing *Snyder*), A38 (also citing *Penn Mutual Life Ins. Co. v. Woodscape Ltd. Partnership (In re*

[11] Judge Easterbrook also expressed concern that vacatur "clouds and diminishes the significance of [a] holding." *Id.* at 1302. This concern can be mitigated by stating that vacatur is granted on account of mootness without reference to the merits. *See* Fisch, *supra*, at 630 n.211.

Woodscape Ltd. Partnership), 134 B.R. 165 (Bankr. D. Md. 1991)). If Judge Reinhardt's opinion in *Bonner Mall* is vacated (but not withdrawn), it will retain the same persuasive force as the *Snyder* and *Kham & Nate's* cases.[12]

e. Vacatur Does Not Create Disrespect for the Courts

This Court's consistent exercise of its power to vacate decisions below in cases that become moot as a result of settlement does not create disrespect for the Federal Courts for several reasons. Vacatur actually *reinforces* the proper role of the Courts: "In all civil litigation, the judicial decree is not the ends but the means. . . . The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

Because vacatur is always within this Court's discretion, 28 U.S.C. § 2106, *supra* p. 2; *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916), this Court is never bound by the parties' actions to grant vacatur. Thus, parties might be able to "purchase" mootness, *Izumi*, 114 S. Ct. at 431 (Stevens, J., dissenting), but they cannot purchase vacatur. As such, there should be no misapprehension that vacatur by this Court subordinates the Court's wishes to the parties' acts.

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12 The persuasive value of the decision below is limited, however, by its obvious omission to consider the simple meaning of the "on account of" phrase in Section 1129(b)(2)(B)(ii) of the Bankruptcy Code. *See* Brief of Petitioner at 23-24; Brief of the California Bankers Association, the New York State Bankers Association, and the American Bankers Association as Amici Curiae in Support of the Petitioner at 27-28.

If the Court fears a public perception that parties with deep pockets can buy and sell precedent, *see Yanakas*, 11 F.3d at 384, it could explain the Federal Courts' interest in vacatur in cases that become moot as a result of settlement. Any such perception at this time may stem from the Courts' failure to expressly state the Federal Court's interest in the practice. *See Oklahoma Radio*, 3 F.3d at 1438 (noting absence of any explication by this Court of its vacatur practice).

The ultimate protection against creating disrespect for this Court, however, is simply to refuse vacatur (or deny certiorari) in any case where it appears that a settlement is not bona fide, *see Izumi*, 114 S. Ct. at 431 (Stevens, J., dissenting) (questioning whether the *Munsingwear* rule should apply to "mootness achieved by purchase"), mootness results from some other perceived abuse, or vacatur is otherwise inappropriate. *See, e.g., Memorial Hosp.*, 862 F.2d at 1302 (identifying courts' special interest in preserving contempt judgments).

II. This Court Should Exercise Its Discretion To Vacate the Decisions Below Based on the Particular Facts and Circumstances of this Case

Regardless of whether the Court finds that the *Munsingwear* rule should generally apply to cases that become moot as a result of settlement, the Court should grant vacatur based on the facts and circumstances of this case. *See Oklahoma Radio*, 3 F.3d at 1444; *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 765 (9th Cir. 1989).

A. U.S. Bancorp's Interest in Vacatur Greatly Outweighs Bonner's Interest in Preserving the Decisions Below

The decision whether to grant vacatur in this case will have a substantial impact on U.S. Bancorp, but no material effect on Bonner. U.S. Bancorp has approximately a $1 billion of loans outstanding in states within the Ninth Circuit. *See supra* p. 4. If the Court of Appeals's decision in this case is not vacated, any of U.S. Bancorp's borrowers under such loans that file for reorganization could rely on the new value exception to attempt to confirm a cramdown plan. Under the Ninth Circuit's decision, the Bankruptcy Courts, District Courts, and Bankruptcy Appellate Panel of the Circuit would be required to apply the new value exception in such cases and to confirm the debtor's plan, whether or not such Courts agree with the Ninth Circuit's reasoning below.

Bonner, by contrast, has no real interest in preserving the decisions below. Bonner has confirmed the Consensual Plan, and any default thereunder will lead to the effective liquidation of the Mall, not a new bankruptcy. *See supra* p. 10. The only scenario in which Bonner might use the new value exception is if Bonner performs under the five-year life of the Consensual Plan and then becomes insolvent. In that case, Bonner still would be unaffected by vacatur unless neither the Ninth Circuit nor this Court have rendered a binding decision resolving new value exception issue. This remote contingency does not compare to U.S. Bancorp's immediate and substantial interest in vacatur of the decision below.

B. The Settlement in This Case Was Not Intended To Vitiate Precedent

Some settlements may be motivated by a desire to vacate an adverse decision. Where settlement is used as the

means for attacking precedent, legitimate concerns may arise. "[A] losing party with a deep pocket should not be permitted to use a settlement to have an adverse precedent vacated." *Clarendon Ltd. v. Nu-West Indus.*, 936 F.2d 127, 129 (3d Cir. 1991). Such concerns are not implicated in this case.

U.S. Bancorp's agreement to the Consensual Plan was a genuine settlement. The agreement was not conditioned on vacatur of the decisions below or even a joint motion to that effect. *See supra* p. 11. To the contrary, U.S. Bancorp's counsel understood that Bonner's counsel probably would oppose vacatur, as is indeed the case. The terms of the settlement reveal it to be completely unlike a case where the party that loses below essentially satisfies the judgment against it and then asks for vacatur.

C. Bonner Is Responsible for the Timing of the Settlement

Bonner and U.S. Bancorp are jointly responsible for the Consensual Plan, and it reflects concessions made by each. *See supra* pp. 4-11. The particular timing of the settlement embodied in the Consensual Plan, however, was Bonner's doing. *See supra* pp. 5, 7-8. By choosing to accept U.S. Bancorp's longstanding settlement terms when it did, Bonner was responsible for the settlement taking place after the decision of the Court of Appeals and before this Court had the opportunity to rule on the merits of the case. Under the circumstances, Bonner rendered the decision below unreviewable.

Where the respondent is responsible for rendering a case moot, vacatur should be granted in order to prevent unfairness to the petitioner. *Diffenderfer v. Central Baptist Church of Miami, Inc.*, 404 U.S. 412 (1972). "Insofar as the prevailing party causes an appeal to become moot, preservation of the district court judgment is problematic. By leaving that

judgment in place, the appellate court may allow the prevailing party to preclude an appeal while retaining the collateral effects of its trial court victory." *Harrison Western Corp. v. United States*, 792 F.2d 1391, 1394 n.2 (9th Cir. 1986). It is particularly appropriate to apply that rule to this case because U.S. Bancorp was fully prepared to advance its arguments before this Court and had already filed its brief on the merits before the Consensual Plan was completed or presented to the Bankruptcy Court.

D. This Case Was Decided Purely on the Law

The decisions below in this case addressed the purely legal question whether the new value exception survived enactment of the Bankruptcy Code. The purely legal nature of the decisions sharply reduces the alleged costs of vacatur in this case.

First, vacatur would not waste any of the time spent by the District and Circuit Courts below. They treated the case generically, and all of their time and resources invested in this case can be recovered in the next new value exception cases they consider, or in other cases that are aided by their efforts. In more typical cases, substantial judicial resources are devoted to a determination of, or application of the law to, unique facts. *See, e.g., National Union,* 891 F.2d 762.

Second, in purely legal cases no third parties have an interest in preserving the preclusive effects of the factual determinations proposed to be vacated. *Contrast Izumi,* 114 S. Ct. 425; *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters,* 686 F.2d 720 (9th Cir. 1982). The loss of such preclusive effects is usually "[t]he most significant cost associated with vacatur," Fisch, *supra,* at 610, but will not occur in this case.

CONCLUSION

For the foregoing reasons, the decisions below should be vacated.

Respectfully submitted,

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